IN THE COURT OF APPEALS OF IOWA

No. 3-260 / 12-1165
Filed June 12, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

UNTRIL DONNELL OVERSTREET,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

Untril Overstreet appeals his judgment and sentence for possession of crack cocaine with intent to deliver and failure to affix a drug tax stamp. **AFFIRMED.**

Steven J. Drahozal of Drahozal Law Office, P.C., Dubuque, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Michael J. Walton, County Attorney, and Melisa Zaehringer, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

Untril Overstreet appeals his judgment and sentence for possession of crack cocaine with intent to deliver and failure to affix a drug tax stamp. He contends his trial attorney was ineffective in failing to: (1) argue that the evidence was insufficient to establish he possessed the crack cocaine and (2) seek the exclusion of what he characterizes as irrelevant and prejudicial evidence.

I. Sufficiency-of-the-Evidence Claim

Overstreet contends the evidence was insufficient to establish he possessed crack cocaine. He raises the argument under an ineffective-assistance-of-counsel rubric because his attorney did not challenge this element in his motion for judgment of acquittal. *See State v*. *Truesdell*, 679 N.W.2d 611, 615-16 (Iowa 2004) ("To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal . . . . The failure of trial counsel to preserve error at trial can support an ineffective assistance of counsel claim."). While we generally preserve ineffective-assistance-of-counsel claims for postconviction relief, a claim based on the sufficiency of the evidence "is a matter that normally can be decided on direct appeal." *Id.* at 616. That is the case here.

To prevail, Overstreet must show that counsel (1) failed to perform an essential duty and (2) prejudice resulted. *Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). Our review is de novo. *State v*. *Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008).

The jury was instructed the State would have to prove the following elements of possession of crack cocaine with intent to deliver:

> 1. On or about the 12th day of November 2011, the defendant knowingly possessed crack cocaine.
> 2. The defendant knew that the substance he possessed was crack cocaine.
> 3. The defendant possessed the substance with the specific intent to deliver a controlled substance.

The jury also received the following instruction on "possession":

> The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.
>
> A person who has direct physical control over a thing on his person is in actual possession of it.
>
> A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion and control over a thing, either directly or through another person or persons, is in constructive possession of it. A person's mere presence at a place where a thing is found or proximity to the thing is not enough to support a conclusion that the person possessed the thing.
>
> If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.
>
> Whenever the word "possession" has been used in these instructions, it includes actual as well as constructive possession and sole as well as joint possession.

It is undisputed Overstreet did not have actual possession of crack cocaine; the case turned on whether he had constructive possession of the drug. On this question, the jury reasonably could have found the following facts.

The Davenport police department received information that Overstreet was selling crack cocaine out of his apartment. According to police sources, that apartment was located on the second floor of a two-story house. The house had a front "common door" providing access to the first-and second-floor apartments

and a back door at the top of an exterior staircase, providing access exclusively to the second floor apartment.

Officers provided a confidential informant with $50 in recorded bills and had the informant purchase crack cocaine from a person the informant knew as "Street." The informant called a cell phone number known to be Street's number[1] and proceeded into the front door of the apartment building. A "couple of minutes" later, the informant left the building and turned over the crack cocaine he had purchased from "Street."

Over the next hour, officers conducting surveillance of the building observed people making short trips to and from the back exterior door. The jury heard testimony that this type of activity is a "red flag[]" for drug dealing. They also heard that, when Overstreet and his girlfriend left the apartment a little over an hour after the confidential informant made the drug purchase, the activity ceased.

After Overstreet left, officers stopped the van in which he was a passenger, apprehended him, and took him to the police station. A strip search uncovered the recorded bills provided by the confidential informant.

Meanwhile, officers armed with a warrant searched the second floor apartment. In a gutter above the back exterior door, they discovered a paper towel containing a baggie of 4.12 grams of crack cocaine. The quantity was equivalent to twenty to forty-one ordinary dosage units. A reasonable juror could

[1] Some parts of the record reflect a one-digit discrepancy in the phone numbers. However, the jury was free to believe the testimony of the officers that the number matched Overstreet's. *See State v*. *Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) (noting the jury is "free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive").

have found that Overstreet had "the power and the intention" to "exercise dominion and control" over those drugs and, accordingly, constructively possessed them.

We recognize that Overstreet was not the sole occupant of the second-floor apartment. *See State v. Dewitt*, 811 N.W.2d 460, 475 (Iowa 2012) (finding when there is joint control, additional evidence is required to connect the defendant to the controlled substance). But, viewed in a light most favorable to the State, the fact that the informant called a cell phone number identified as Street's number, said he purchased the drugs from "Street," and gave him marked bills which were later found in Overstreet's possession, support an inference that he was the occupant who exercised dominion and control over the drugs. *See State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010) (describing standards for review of a sufficiency-of-the-evidence challenge).

Because the record contains sufficient evidence to support the possession element, Overstreet's attorney was not ineffective in failing to challenge the evidence supporting this element.

II. Failure to Object

Overstreet contends his trial attorney was ineffective in failing to seek the exclusion of what he characterizes as "irrelevant, prejudicial" evidence that (1) a confidential source purchased crack cocaine from him, (2) he possessed marijuana when arrested, (3) ecstasy pills were found with the crack cocaine, and (4) a stolen police taser was found in the apartment.

A. *Confidential Source*.

Overstreet claims the information about the confidential source and the controlled buy was inadmissible. He contends his trial counsel should have objected to the evidence as irrelevant and as improper character evidence. *See* Iowa R. Evid. 5.401 (defining relevant evidence); 5.402 (excluding evidence which is not relevant); 5.403 (excluding unfairly prejudicial evidence even if relevant); 5.404(b) (excluding evidence of another crime or prior bad acts that is introduced as character evidence).

We have previously decided a virtually identical issue on direct appeal and we find the record adequate to do so here. *See State v*. *Miller*, No. 11-0732, 2012 WL 1860778, at *1, 3-4 (Iowa Ct. App. May 23, 2012). As in *Miller*, we conclude the evidence of the controlled buy was relevant to establish Overstreet's intent to deliver and its high probative value on that element was not substantially outweighed by its prejudicial effect. Accordingly, counsel did not breach an essential duty in failing to object to this evidence.

B. *Marijuana*, *Ecstasy*, *and Taser*

As noted, Overstreet also claims his trial attorney was ineffective in failing to seek the exclusion of evidence relating to marijuana, ecstasy pills, and a stolen police taser.

The record is littered with references to the other drugs. We preserve for postconviction relief proceedings the question of whether counsel was ineffective in failing to object to this evidence, to allow counsel an opportunity to explain his strategy. *See State v*. *Shortridge*, 589 N.W.2d 76, 84 (Iowa Ct. App. 1998).

As for the claim relating to the taser, the record is inadequate to decide that issue, and it is also preserved for postconviction relief proceedings.

III*. *Disposition

We affirm Overstreet's judgment and sentence for possession of crack cocaine with intent to deliver and failure to affix a drug tax stamp, and we preserve for postconviction relief proceedings his claims that his attorney should have objected to the marijuana, ecstasy pills, and taser evidence.

AFFIRMED.